No. 80-307

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In the Supreme Court of the United States

OCTOBER TERM, 1979

STEPHENS INSTITUTE, A CORPORATION d/b/a ACADEMY OF ART COLLEGE, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Board properly relied on a stipulation of fact in asserting jurisdiction over petitioner.

2. Whether the court of appeals properly declined to remand the case to the Board for reconsideration in light of *NLRB* v. *Yeshiva University*, No. 78-857 (Feb. 20, 1980).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 123-136) is reported at 620 F. 2d 720. The decisions and orders of the National Labor Relations Board (Pet. App. 1-78, 79-122) are reported at 241 N.L.R.B. No. 71 and 241 N.L.R.B. No. 133.

JURISDICTION

The judgment of the court of appeals was entered on July 3, 1980 (Pet. App. 137-147). The petition for a writ of certiorari was filed on August 28, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND REGULATION INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, and the Code of Federal Regulations are set forth at Pet. 2-5.

STATEMENT

1. In two separate unfair labor practice proceedings, the Board found that petitioner, in response to union[1] organizing activity, violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), by discharging three employees because of their union activities, by discharging and failing to reinstate unfair labor practice strikers, and by denying reemployment to employees because of their union activities. The Board also found that petitioner violated Section 8(a)(1) of the Act by threatening and interrogating its employees, by soliciting employees to engage in surveillance of a union meeting, and by offering employees more work at a higher salary if the employees agreed to abandon their protected activity. The Board further found that petitioner violated Section 8(a)(2) and

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[1]California Federation of Art Teachers, Local No. 1.

(1) of the Act by creating, dominating, assisting and contributing to the support of the Academy of Art College Faculty Senate, and by recognizing the Faculty Senate as the representative of its employees in negotiations concerning wages, hours, and other terms and conditions of employment (Pet. App. 70-71, 116).

2. The court of appeals upheld the Board's factual findings (Pet. App. 124) and petitioner does not dispute them here. Its sole contentions are that the Board improperly asserted jurisdiction over it and that the court of appeals erred in refusing to remand the case for reconsideration in light of *NLRB* v. *Yeshiva University*, No. 78-857 (Feb. 20, 1980). The facts relevant to these issues are set forth below.

Petitioner is a corporation that owns and operates a private art school. The art school has approximately 1,000 full and part-time students and employs approximately 58 instructors (Pet. App. 15-16). Richard A. Stephens is petitioner's president, principal stockholder and principal administrative officer. With the assistance of his three-member administrative staff, he makes all important policy decisions, including the hiring and firing of instructors (*ibid.*). Most of the school's departments have chairpersons who serve to some extent as intermediaries between the staff and the other instructors (Pet. App. 17). The instructors are paid on the basis of the number of classes per week that they teach (Pet. App. 124).

Based on charges filed by the Union, the Board issued a complaint alleging that petitioner had violated the Act. At the commencement of the unfair labor practice hearing, petitioner and the Board's Regional Director entered into an informal partial settlement agreement, wherein petitioner agreed to reinstate 16 strikers and stipulated, *inter alia*, to certain facts that brought the art school within the

Board's jurisdiction (Pet. App. 4-6, 13-14).[2] The settlement agreement was received in evidence at the hearing (Pet. App. 5; GCX 3; Tr. 5-6, 9).[3] The hearing thereafter focussed on the remaining issues, which concerned the reinstatement of 6 employees that petitioner asserted were supervisors.[4]

Following the completion of the hearing, petitioner violated the settlement agreement with the Regional Director by, *inter alia*, failing to fully reinstate a number of the strikers. This violation of the settlement agreement caused the Regional Director to set it aside and move to reopen the hearing (Pet. App. 4-6, 63-67). At no time after the hearing resumed did petitioner present evidence

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[2]Under Section 103.1 of the Board's Rules and Regulations (29 C.F.R. 103.1), the Board asserts jurisdiction over private nonprofit colleges and universities that have gross annual revenues of not less than $1 million.

[3]"GCX" refers to the General Counsel's exhibits at the hearing. "Tr." refers to the transcript therein.

[4]The Board found that the 6 employees were not supervisors. Petitioner's claim of supervisory status was based on the allegation that the 6 employees (Doyle, Rees, Pratchenko, Warton, Keller and Sher) were department chairpersons. However, the administrative law judge found that after the inception of the organizing campaign, Doyle, Warton and Keller were formally relieved of their position as chairpersons (Pet. App. 41, 54-56). In addition, Pratchenko "was not treated as, nor given the responsibility of, more than a rank-and-file instructor * * *. He did not participate in any administrative function; he had no counseling duties; his maintenance duties already had been taken over by Warton; and he made no recommendations concerning teacher assignments, new hires, discharges or schedules" (Pet. App. 43). The Board further found that "[i]t was not shown that Rees ever exercised independent judgment in any supervisorial function," and that he was not treated by management as a supervisor (Pet. App. 46). Sher was designated chairperson of the printmaking department. However, that department, which was part of the fine arts department, contained no more than four instructors, including Sher, and her designation as chairperson was informal. Indeed, she "never was told that she had supervisory authority; that she never hired, fired, effectively recommended, directed or otherwise

contradicting its admissions in the settlement stipulation of the facts that established the Board's jurisdiction (Pet. App. 6).

The Board rejected petitioner's post-hearing assertion that the Board was not entitled to rely on petitioner's admissions of jurisdictional facts simply because the Regional Director had withdrawn approval of the settlement agreement. The Board observed that the stipulations between petitioner and the Regional Director and between petitioner and the Union (Pet. App. 6):

> once entered into evidence, constituted a judicial admission on [petitioner's] part as to the facts contained therein. Such an admission has the effect of a confessory pleading and its principal characteristic is that it is conclusive upon the party making it. E.g., *The Kroger Co., Houston Division*, 211 N.L.R.B. 363, 364 (1974); see, generally, 9 Wigmore, *A Treatise on Evidence in Trials at Common Law*, §§2588, 2590 (3d ed. 1940).

Moreover, the Board emphasized that "[a]t no time during the proceeding did [any party] seek to withdraw from [the stipulations] or introduce evidence contrary thereto" (*ibid.*).

In the second unfair labor practice proceeding involving petitioner, the Board rejected petitioner's attempt to rescind the stipulation as to jurisdiction (Pet. App. 86-87). In addition, the Board found that the evidence of record in the second proceeding established that petitioner's gross revenues MET THE Board's jurisdictional standard (Pet. App. 87-89).

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supervised other employees; and * * * she did not consider herself as a supervisor" (Pet. App. 57-58).

4. The court of appeals rejected petitioner's contention that, because the Board set aside the settlement, it was also required to set aside the stipulation as to jurisdiction (Pet. App. 132). The court explained that (Pet. App. 133; footnote omitted):

> The reopening of charges before the Administrative Law Judge did not, and could not, affect those facts which were already in evidence in the case. Whether those facts were adduced by stipulation, testimony or documentary evidence, they are part of the record in the case. The reopening of the proceeding, in accordance with the terms of the settlement agreement, does not nullify the stipulation to jurisdiction. In addition, the Academy's defense at the hearing did not call into question the existing stipulation. At no point did the Academy seek to withdraw from the stipulation. Rather, appellant simply argued that it had cancelled the classes pursuant to the minimum enrollment provisions of the settlement agreement. We cannot accept the Academy's assertion that either equity or general principles of contract law require this Court to set aside a stipulation which was freely entered into, never withdrawn, and is part of the record in the case.

With respect to the second unfair labor practice proceeding, the court also noted that ample independent evidence as to gross receipts was presented, thus negating any claim of lack of jurisdiction (Pet. App. 133).

Finally, the court of appeals rejected petitioner's contention that the instructors at the art school were exempt from coverage under the Act under the authority of *NLRB* v. *Yeshiva University*, No. 78-857 (Feb. 20,

1980), which was decided after the Board's decision herein. The court explained (Pet. App. 135-136):

> In *Yeshiva* the Court applied the managerial employee exception to a "mature" university. The Court relied heavily on the policy making role of the faculty at such an institution. The instructors at the Academy hardly share such a role. They have no input into policy decisions, and do not engage in management level decision making. They are simply employees. Also, the Academy bears little resemblance to the non-profit "mature" university discussed in *Yeshiva*.

ARGUMENT

1. The court of appeals' ruling that petitioner's stipulation of jurisdiction remained a part of the record after the settlement was rescinded is correct, conflicts with no other decision, and raises no issue warranting review by this Court.[5] For the reasons stated by the court of appeals (Pet. App. 132-133), petitioner's formal judicial admission remained part of the record in this case. That admission was not removed from the record simply

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[5]The cases relied on by petitioner (Pet. 9-12) are completely inapposite. *Gulf States Manufacturers, Inc.* v. *NLRB*, 598 F. 2d 896, 903-904 (5th Cir. 1979), did not involve any question concerning judicial admissions. That case simply held that, when a Regional Director approves a settlement that includes withdrawal of unfair labor practice charges, those charges cannot later be revived when the charged party subsequently commits unrelated unfair labor practices. *A & A Sign Co.* v. *Maughan*, 419 F. 2d 1152, 1155 (9th Cir. 1969), and *Emerick & Duncan Co.* v. *Hascy*, 146 F. 688, 695 (9th Cir. 1906), dealt with stipulations concerning remedies, not admissions of underlying jurisdictional facts. *Stoffela* v. *Nugent*, 217 U.S. 499 (1910), is also irrelevant here. That case simply holds that a mortgagee does not forfeit moneys owed him under a mortgage because of a fraudulent attempt on his part to obtain ownership of the mortgaged property.

because petitioner breached its settlement agreement and thereby compelled the Board to resume the proceeding. Moreover, even assuming that petitioner had the right to contradict its judicial admission, it wholly failed to do so. Petitioner offered no evidence contrary to its prior admission, and thus offered no factual basis for questioning its accuracy.[6]

2. There is no merit to petitioner's assertion (Pet. 12-15) that this Court's decision in *Yeshiva* requires a remand to the Board. In *Yeshiva*, this Court held that at a "mature" university where the faculty " 'in effect, substantially and pervasively operat[es] the enterprise,' " the full-time faculty members are managerial employees beyond the Act's coverage. Slip op. 18. At the same time, however, the Court cautioned against generalities about the status of faculty (*id.* at 17-18, n.31):

> It is plain, for example, that professors may not be excluded merely because they determine the content of their own courses, evaluate their own students, and supervise their own research. There thus may be institutions of higher learning unlike Yeshiva where the faculty are entirely or predominantly nonmanagerial. There also may be faculty members at Yeshiva and like universities who properly could be included in the bargaining unit.

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[6]Petitioner's assertion (Pet. 11) that the General Counsel did not attempt to prove jurisdiction after the settlement was rescinded because the facts would not meet of the Board's discretionary jurisdictional standards is not borne out by the record. The jurisdictional facts established at the hearing in the second unfair labor practice case—facts that are not challenged before this Court—covered the year 1977, when the unfair labor practices in the first case occurred. Thus, direct evidence in addition to the August 1977 admission shows that the Board's jurisdictional standards were met at the time the first case was litigated. Cf. *NLRB* v. *Timberland Packing Corp.*, 550 F. 2d 500, 501 (9th Cir. 1977), cert. denied, 434 U.S. 922.

Here, in contrast to *Yeshiva*, the faculty played no role of any significance other than teaching. Petitioner's contention that the instructors were managerial because they elected members of the Faculty Senate ignores the fact that the Faculty Senate never existed prior to January 24, 1977 (Pet. App. 59), and was created solely "to provide [petitioner] with a way to regulate working conditions through an in-house arrangement rather than through negotiations with an independent union" (Pet. App. 60). Moreover, since petitioner alone created and had power to abolish the Senate, the Board found that petitioner's domination, assistance and support of the Senate violated Section 8(a)(2) and (1) of the Act. In effect, petitioner seeks to plead its own unfair labor practice—creating the Senate as a means of dissipating support for the Union—as proof that its instructors were pervasively in charge of the university. These facts, however, are only further illustrations of the separation between instructors and management at Stephens Institute and the absence of faculty control over the educational enterprise. As the court of appeals emphasized (Pet. App. 136): "[The instructors] have no input into policy decision, and do not engage in management level decisionmaking. They are simply employees."

Petitioner's further assertion (Pet. 14) that, whatever the status of its instructors generally, its chairpersons participated in management of the school and therefore are managerial employees, is also wide of the mark. As the Board expressly found, none of the discriminatees involved in this case functioned as chairpersons at the time of their discharge (see page 3 note 4, *supra*).[7]

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[7]The instant case differs significantly from *Trustees of Boston University* v. *NLRB*, No. 78-67 (Mar. 3, 1980), vacating and remanding the decision of the court of appeals (575 F. 2d 301 (1st

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Cir. 1978)) for further consideration in light of *Yeshiva*. In *Boston University*, the court of appeals concluded that department chairpersons were employees under the Act because, to the extent they participated in supervisory or managerial matters, their "recommendations were not 'effective' or [they were] acting 'in the interest' of the faculty, not of the employer." 575 F. 2d at 306. Here, by contrast, no chairpersons who participated in any arguably supervisory or managerial matters were involved in the case. Moreover, while Boston University is arguably a university similar to Yeshiva, the court of appeals correctly concluded here that petitioner "bears little resemblance to the non-profit 'mature' university discussed in *Yeshiva*" (Pet. App. 136).

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